FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 4 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

Number [redacted] 18

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI

JOSEPH A. KEITH
Counsel for Respondent

GULLETT & GULLETT
Security Building
Denison, Texas

FREEMAN, WOLFE & KEITH
M. & P. Bank Building
Sherman, Texas
Of Counsel

E. Duncan & Co., Brief Printers, Dallas

Subject Index

	Page
Challenge of Grounds of Jurisdiction	1- 2
Statement under Challenge of Grounds of Jurisdiction	2- 3
Authorities and Argument under Challenge of Grounds of Jurisdiction	3-11
Answer to Petitioner's Brief	11-12
Concise Statement of the Case	12-17
Respondent's Counter Propositions in Answer to Petitioner's Specification of Error	17
First Counter Proposition	17
Second Counter Proposition	17
Third Counter Proposition	18
Fourth Counter Proposition	18
First Basic Question	18
Second Basic Question	18-19
Propositions Presented and Summary of Argument	19-22
First Counter Proposition Restated	22
Statement under First Counter Proposition	22-23
Authorities and Argument under First Counter Proposition	23-25

Subject Index—Continued

	Page
Second Counter Proposition Restated	25
Statement under Second Counter Proposition	26-27
Authorities and Argument under Second Counter Proposition	27-34
Third Counter Proposition Restated	34
Fourth Counter Proposition Restated	34
Statement under Third and Fourth Counter Propositions	35-38
Authorities and Argument under Third and Fourth Counter Propositions	38-40
First Basic Question	40
Statement under First Basic Question	40-42
Authorities and Argument under First Basic Question	42-49
Second Basic Question	49
Statement under Second Basic Question	49-50
Authorities and Argument under Second Basic Question	50-52
Conclusion	53
Certificate of Service on Opposing Counsel	53

INDEX OF AUTHORITIES

	Page
Albright vs. Pennsylvania R. Co., 37 Atl. (2) 870	8
Baltimore & O.R. Co. vs. Groeger, 266 U.S. 522; 69 L. Ed. 421	34
Boyle vs. Pennsylvania R. Co., 228 Fed. 266	5
Brady vs. Southern Railway Co., 320 U.S. 476; 88 L. Ed. 239; 64 Sup. Ct. 232	47
Chicago & N.W. R. Co. vs. Bower, 241 U.S. 470; 60 L. Ed. 1107	33
Chicago R. I. & P. Co. vs. Ship, 174 Fed. 353	31
Chicago, St. P.M. & O.R. Co. vs. Arnold, 160 Fed. (2d) 1002	45
Davis vs. Kennedy, 266 U.S. 147; 69 L. Ed. 212; 45 Sup. Ct. 33	47
Great Northern Ry. Co. vs. Hooker, 170 Fed. 154	30
Howard vs. Illinois Central R. Co., 207 U.S. 463; 52 L. Ed. 297; 28 S. Ct. 141	4
Illinois Central R. Co. vs. Berhens, 233 U.S. 473, 58 L. Ed. 1051, 34 S. Ct. 646	4
Illinois Central R. Co. vs. Perry, 242 U.S. 292, 61 L. Ed. 309, 37 S. Ct. 122	5
Jessionowski vs. Boston & Maine R. Co., 91 L. Ed. 355 (Advance Sheet 5)	51

INDEX TO AUTHORITIES—Continued

	Page
Keith vs. Wheeling & L. E. Ry. Co., 160 Fed. (2d) 654	25, 48
Lang vs. New York Central R. Co., 255 U.S. 455; 65 L. Ed. 729; 41 S. Ct. 381	51
Lavender vs. Kurn, 327 U.S. 645; 90 L. Ed. 916; 66 S. Ct. 740	29
McGowan vs. New York Central R. Co., 39 N. Y. Supp. (2d) 533, 50 N.E. (2d) 295	9
Mondou vs. New York, N. H. & HR Co., 233 U.S. 1, 56 L. Ed. 327, 32 S. Ct. 169	4
Southern Railway Company vs. Dantzler, 286 U. S. 318, 76 L. Ed. 1127; 52 S. Ct. 520	47
Southern Railway Company vs. Youngblood, 286 U.S. 313; 76 L. Ed. 1124, 52 S. Ct. 518	47
Taylor vs. Lumaghi Coal Company, 181 S. W. (2d) 536	8
Thaxton vs. Louisiana Ry. and Nav. Co., 95 Southern 773	5
Tiller vs. Atlantic Coast Line R. Co., 318 U.S. 54; 87 L. E. 610, 66 S. Ct. 444	38, 43, 44, 51
Unavilla Valley Railway Company vs. Caldine, 278 U.S. 139; 73 L. E. 224; 49 Sup. Ct. 91	47

BLEED THROUGH- POOR COPY

INDEX TO AUTHORITIES—Continued

	page
U.S.C.A. Title 45, Sec. 51, 10 F.C.A., Title 45, Sec. 51	3, 50
49 U.S.C.A. Title 49 Sec. 26	24
Watts vs. Ohio Valley Electric Ry. Co. (S. Ct. of W. Va) 88 S. E. 659	6
Wheelock vs. Freiwald (C.C.A. 8th) 66 Fed. (2d) 694	52
Willis vs. Pennsylvania Railroad Company, 122 Fed (2d) 248; 314 U.S. 684; 86 L. Ed. 547	43
Yazoo & M. V. R. Co. vs. Mullins, 115 Miss. 343; 76 So. 147; 249 U.S. 531; 63 L. Ed. 754	32

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

Number [redacted] 893

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI

CHALLENGE OF GROUNDS OF JURISDICTION

A.

This Court has no jurisdiction based upon Paragraph B. of Section 344, Title 28 of the Jurisdictional Code as amended, 28 U.S.C.A. 344, because this suit does not infringe upon any title, right, privilege or immunity spe-

cially set up or claimed by any party under any statutes of the United States.

B.

This Court has no jurisdiction to review on Writ of Certiorari under Section 5, Rule 38 of the Revised Rules of the Supreme Court of the United States because the Petitioner, R. P. Hunter, at the time of the happening of the incident in question was not engaged in interstate commerce but was engaged wholly in intrastate commerce, and his rights were confined solely to those given by the laws of Texas in this regard, and the refusal of the Writ of Error by the Supreme Court of Texas (R. 154) foreclosed to the petitioner any right that he might have had under the laws of the State of Texas.

STATEMENT

It is undisputed that at the time of the happening of the incident in question, the Petitioner was and had been for about a year and a half working between the cities of Denison and Sherman, Grayson County, Texas, making five round trips a day between the two cities (R. 44). He was operating what is known as a "plug" run between the two cities. He was engaged solely in handling passengers, express, if there was any to go, and baggage (R. 44-45). There is no showing in the record that the Petitioner handled anything except the aforementioned

BLEED THROUGH– POOR COPY

passengers, express, and baggage between the two cities. There is no showing in the record that he ever handled interstate express. There is no showing in the record that he ever handled any interstate baggage. There is no showing in the record that the Respondent ever issued or the Petitioner ever handled any interstate tickets. The record conclusively shows that he handled only passengers between the cities of Denison and Sherman in Grayson County, Texas. The distance between Denison and Sherman being approximately ten (10) miles. It is true as found by the Court of Civil Appeals that the Texas Electric Railway Company was engaged in interstate commerce. (R. 148).

ARGUMENT AND AUTHORITIES

U.S.C.A., Title 45, Section 51 provides in part as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The above quoted section is what is commonly known and referred to as the 1939 Amendment to the aforesaid Section 51, and does extend the benefits and includes greater numbers of railroad employees than did the Act

as it existed prior to August 11, 1939. It cannot be insisted that the so-called 1939 Amendment included all employees of railroads or interurban lines because Congress does not have the power to pass such an act extending the benefits of the Federal Employers' Liability Act to all employees of interstate railroads or railroads engaged in interstate commerce. If it did, such actions on the part of Congress would be unconstitutional. The original Federal Employers' Liability Act of June 11, 1906, was unconstitutional for the reason that it did attempt to extend to all employees of railroads engaged in interstate commerce. See, *Howard vs. Illinois Central Railroad Company*, 28 S. Ct. 141; 207 U.S. 463; 52 L. Ed. 297.

The Act under consideration was passed April 22, 1908, and was held to be constitutional for the reason that it only covered those employees engaged in interstate commerce. See, *Mondou vs. New York, N. H. & H. R. Co.*, 32 S. Ct. 169; 223 U.S. 1; 56 L. Ed. 327.

The quoted section of the Act as amended became effective August 11, 1939.

The original Act was construed by this Court to embrace only those employees who at the very time of the injury was engaged in interstate commerce. See, *Illinois Central R. Co. vs. Berhens*, 233 U.S. 473, 58 L. Ed. 1051, 34 S. Ct. 646.

BLEED THROUGH– POOR COPY

The case of *Illinois Central R. Co. vs. Perry*, 242 U.S. 292, 61 L. Ed. 309, 37 S. Ct. 122 was a case in which a railroad employee was engaged in service between two points within the state. He made a round trip every day. He did carry interstate freight on the going out trip, but at the time he was injured on the return trip he was handling only intrastate or domestic commerce. The court held that he was not engaged in interstate commerce within the meaning of the Act on his return trip and thus did not come under the Act.

The case of *Thaxton vs. Louisiana Ry. and Nav. Co.*, 95 Southern 773, decided by the Supreme Court of Louisiana, was a case wherein a conductor engaged in shuttle train service between Alexandria and Camp Beauregard in the State of Louisiana. The train oscillated daily without ever going beyond either the city or the camp. In this case it was admitted that the railroad itself was engaged both in intrastate commerce and in interstate commerce. The railroad itself extended only from New Orleans to Shreveport, entirely within the state of Louisiana. The Court held that the showing made was wholly insufficient to bring the plaintiff within the Federal Employers' Liability Act. That is, the court held that he was not engaged in interstate commerce at the time he received his injury.

The case of *Boyle vs. Pennsylvania R. Co.*, 228 Fed. 266, was a case wherein the plaintiff's intestate was en-

gaged as a car inspector. The defendant was operating companion trains going in opposite directions between Philadelphia and Pottsville, wholly within the state of Pennsylvania. They were scheduled to meet at Phoenixville. It was the duty of the decedent to inspect both trains. After inspecting the first train, he was awaiting the arrival of the second train, leaning against the engine of the train he had just inspected. While in this position, he was struck by the engine of the incoming train and killed. Both trains were operating between points in the state of Pennsylvania. Both were advertised on defendant's time table to connect West Philadelphia with trains to and from New York. *Neither* train at the time of the injury of the deceased was shown to have been carrying passengers, baggage or express matter in interstate commerce. The court held that under these circumstances the deceased at the time of his injury was *not* engaged in interstate commerce.

The Case of *Watts vs. Ohio Valley Electric Ry. Co.* by the Supreme Court of West Virginia, 88 S.E. 659, was a case brought by an injured employee against an electric interurban line. The evidence showing the railroad company was engaged in both interstate and intrastate commerce. In fact, it extended from one state to another, that is, from West Virginia over into Kentucky. The car operated by plaintiff operated within the city limits of Huntington, West Virginia, between Ninth and Twenty-sixth Streets, East. Under the rules of the com-

BLEED THROUGH– POOR COPY

pany, a passenger on the westward bound car who desired to go further than the end of that line was given a transfer which entitled him without the payment of additional fare to ride on a Huntington and Ashland car as far as Camden Park, West Virginia; and by the payment of additional fare after he reached that point, he could continue on the same car to Ashland in the state of Kentucky. It is true that in this case the plaintiff received his injury within the city of Huntington, West Virginia, but on a run involving the movements above set out. In disposing of the contention that the plaintiff was engaged in interstate commerce, the court said:

> "Defendant is an interstate, as well as an intrastate, carrier; and, in certain cases, is liable under the federal act for injury to an employee. But that act does not apply, unless the injured servant and the carrier are both, at the time of the injury, engaged in interstate traffic. See Federal Employers' Liability Act; Pedersen v. Delaward, etc., R. Co. 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1941C, 153; Easter v. N. & W. Ry. Co., 86 S. E. 37; Richey on Federal Employers' Liability, 67, and numerous cases cited in note. The car on which plaintiff was motorman was operated wholly within the city limits of Huntington, and, at the time of the collision, was carrying no passengers. Hence it was not, in any sense, then engaged in interstate commerce."

The facts in the last three named cases are much stronger and display much more activity as affecting interstate commerce than the case at bar. In this case, the Texas

Electric Railway Company operated wholly within the state of Texas, and the activities of Hunter as will be hereinafter shown were confined solely to intrastate commerce.

But the matter being argued that the so-called 1939 Amendment to the Federal Employers' Liability Act changes the rule so that the same would include employees such as Hunter. We do not think so. We do think that a true test of the 1939 Amendment was laid down by the Supreme Court of Missouri in the case of *Taylor vs. Lumaghi Coal Company*, 181 S.W. (2d) 536, which court expresses the correct rule as follows:

> "It seems to us that the test, 'any part of whose duties shall be in furtherance of interstate commerce,' means to include, at least, any part of such employee's duties on the particular mission or continuous operation to which he is assigned for the particular work period or tour of duty on which he has commenced to serve."

The Maryland Court of Appeals, in the case of *Albright vs. Pennsylvania R. Co.*, 37 Atl. (2d) 870, in a well considered opinion laid down what we consider to be the correct rule, as follows:

> "The present test as to whether one is engaged in interstate commerce is: Were his duties or any part thereof at the time of injury in furtherance of interstate commerce; or did his duties affect in any way, directly or closely and substantially, such commerce? If so, then the employment is in interstate commerce."

BLEED THROUGH– POOR COPY

See also the holding of the New York Court of Appeals in the case of *McGowan vs. New York Central R. Co.*, 39 N.Y. Supp. (2d) 533, 50 N.E. (2d) 295, where an assistant terminal foreman who was injured while working on or about a locomotive boiler was not employed in interstate commerce under the 1939 Amendment, and hence was covered by the New York Workmen's Compensation Law and not by the federal law.

A reading of each of the above cases will disclose that Hunter's activities were much more unrelated to interstate commerce than any of the above.

Now, in this case the facts reflect that Hunter's duties did not in any way further interstate or foreign commerce, nor in any way directly or closely and substantially affect such commerce. He was only engaged as an operator of a "plug" interurban between the cities of Denison and Sherman, Texas, a distance of approximately ten (10) miles.

The record conclusively evidences the fact that he left Sherman at 7:05 o'clock in the morning, made five round trips to Denison, and then was through for the day. There is no showing that he was ever delivered a connecting line ticket entitling the holder to a trip in interstate commerce. (In truth and in fact the Texas Electric Railway Company does not under any circumstances sell such tickets or accept the same.)

He did testify that once in a while he did [redacted] handle baggage, [redacted] or express moving in INTRASTATE [redacted] commerce. In truth and in fact there is no showing in the record that Hunter was in any wise at any time and upon any occasion for a period of a year and a half before his injuries engaged in interstate commerce.

His activities as disclosed by his own testimony and the record in this case were confined solely to intrastate commerce.

If this Act is extended to include the Petitioner, R. P. Hunter, then any employee doing any work for any railroad in any capacity, clerical or otherwise, would be engaged in interstate commerce within the purview of the Act and would be entitled to the rights and privileges of the Federal Employers' Liability Act.

It is respectfully submitted that this was not the intention of Congress, and in truth and in fact Congress did not have this power, because, as above stated, had Congress attempted to bring every employee of every common carrier within the Act, then such action on the part of Congress would have been unconstitutional and of no force and effect.

The Petitioner's remedies were governed solely by the laws of Texas and he having appealed to all of the forums of the State of Texas, and they having decided adversely to his contention, it is respectfully submitted that his

BLEED THROUGH– POOR COPY

remedies, if any he had, have been fully and finally foreclosed to him, and this Court has no jurisdiction to hear and determine this cause on petition for certiorari.

ANSWER TO PETITIONER'S BRIEF

Without waiving the foregoing contest of jurisdiction and still insisting that this court does not have jurisdiction to review this case of certiorari, the Respondent in answer to Petitioner's brief would respectfully submit the following:

The Respondent calls the attention of the Court to Petitioner's specifications of error found on page 6 of his brief.

These specifications of error from first to fourth, inclusive, appear to us to be vague, indefinite and insufficient. It will be noted that there is no showing in the specifications of error that the Petitioner submitted to the State Trial Court requested issues upon the proximate cause of any of the negligence complained of in said specifications of error. It is not made to appear in said specifications of error that the court refused to submit issues as to proximate cause. If the court, upon examination, concludes that the submission of the questions of negligence in the respect complained of in the specifications of error without request from the Petitioner, and the refusal of the court to submit issues as to proximate cause would be without avail. It seems

that there is no specification of errors sufficient to warrant further consideration of the cause. Attention is called to the condition of said specifications so that if the Court elects to do so, examination may be made and conclusion reached as to the sufficiency of each and all of said specifications of error.

CONCISE STATEMENT OF THE CASE

The statement of the CASE set out by the Petitioner on page 2 et seq. of his brief does not correctly state the case but is replete with conclusions of Petitioner's counsel, and for that reason is challenged in toto by the Respondent.

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas (R. 47 et seq., 194 S.W. (2d) 281), which is nowhere challenged either by the Petitioner or the Respondent, does set forth correctly, fairly and impartially such facts and the same is adopted by the Respondent as its concise statement of the case as follows:

"Appellant, R. P. Hunter, sued Appellee, Texas Electric Railway Company, to recover damages for personal injuries sustained in a head-on collision between an electric motor car driven by himself and a similar one driven by T. N. Maxwell. Appellant admitted that in violation of his time card instruction and the rules of appellee he proceeded about three-fourths of a mile beyond the siding

BLEED THROUGH– POOR COPY

where he was to meet and pass the car driven by Maxwell, which fact caused the collision between the cars. In consequence the trial court submitted only issues of discovered peril, which the jury found against appellant; and conditionally on having answered "no" to the discovered peril issue, an issue as to whether the negligence of appellant in passing the meeting point was the sole proximate cause of the collision, which the jury answered in the affirmative. Accordingly judgment was rendered for appellee. Appellant contended that his pleadings and evidence raised jury issues on three acts of negligence as the proximate cause of the collision, and that the court erred in refusing to submit his requested special issues for jury findings thereon. The three acts of negligence were as follows:

1. That appellee was negligent in failing to provide an automatic block device in the sector of the collision, or in employing the time card system it did for the passage of cars in the sector of the collision.

2. That the operator (Maxwell) of the southbound car failed to properly slow down his car before the collision.

3. That Maxwell failed to apply the brakes on his car as he approached the point of the collision.

The testimony of appellant having shown as a matter of law that his negligence in violating his time card instruction and the rules of appellee in passing the meeting

point without performing the mandatory duties devolving upon him under the rules of appellee was the sole proximate cause of this collision, the only issues that need be submitted were those relating to discovered peril. And the jury having found those issues against appellant, he is not entitled to recover.

The evidence shows that appellee railway line here involved is operated between the cities of Sherman and Denison. Appellee operates electrically propelled interurban cars for carrying passengers and freight for hire, and is engaged in interstate commerce. Each passenger car is operated by one man known as an operator. To facilitate the movement of cars, called trains, between Sherman and Denison, appellee furnished each operator daily with a time card. The time card under which appellant was operating at the time of the collision was hung on a hook immediately in front of where he was seated on the left hand front of the car. It required five trips daily by him from Sherman to Denison, a distance of 10 miles, and this schedule had been the same for the previous six months. Appellant had been employed by appellee or its predecessors for about 32 years, the first 8 as a dispatcher handling the movement of cars or trains, and the last 24 years as an operator, and for the last 11 years he had operated a one-man car or train over the route between Sherman and Denison under the time card method or system. The time card required appellant to meet, wait for, and pass the car operated by Maxwell at a siding called Wood-

BLEED THROUGH– POOR COPY

lake. On May 2, 1944, on his fourth trip for the day, appellant left Sherman at 2:30 on schedule time, going north to Denison. He was operating "Train No. 58," which was to meet, wait for, and pass "Train No. 15," operated by Maxwell at 2:45 at Woodlake. The time card and rules of appellee required appellant to wait there for the Maxwell train to pass on the siding, and if the Maxwell train should display a certain flag showing another section or extra train following, to wait until same had passed on the siding before he should proceed. If the Maxwell train or car were late, appellant was required under the rule to go to the nearby phone booth of appellee and call the dispatcher for further orders before proceeding.

Appellant testified that he reached Woodlake about on time; that he glanced over his shoulder and thought he saw Maxwell's car on the siding; that in about one-half of a minute without looking for any flag that might be displayed or without phoning the dispatcher, he passed the meeting point and had proceeded about three-fourths of a mile when he saw the Maxwell car coming around a curve very fast, and the collision occurred at about 2:47. Appellant testified that when he saw the Maxwell car he brought his car to about a stop; that Maxwell judging from the action of his car, appeared to have thrown it in reverse, a method of stopping it quickly, and then Maxwell jumped from the door of his car, which proceeded to the point of the collision, the impact of which crushed the front end of both cars, breaking appellant's

leg and otherwise injuring him, and also a number of passengers. Appellant admitted that he violated the instruction on his time card and the rules of the company in proceeding beyond the meeting point, and as to the cause of the collision appellant testified:

"Q. Now, No. 15 was coming along in a southerly direction. That is where he is supposed to be. A. Yes, sir.

Q. At that time, you were supposed to be waiting back at Woodlake. A. Yes, sir.

Q. And you didn't wait for him at Woodlake, as the time card required you to do. A. I didn't, no.

Q. And you passed that meeting point and met him down at the curve. A. Yes.

Q. During all that time you had been following this regular schedule that you outlined to the jury, leaving Sherman at those various times. A. Yes, sir.

Q. This is the only time in the six months period that you failed to stop and wait for No. 15 at Woodlake, or call the dispatcher. A. That's right.

Q. If you had failed to call the dispatcher or waited at Woodlake prior to May 2nd, you would have had the accident prior to this time. A. Yes, the chances are.

Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake, as the time card and rules required you to, this would not have happened. A. No.

BLEED THROUGH- POOR COPY

Q. What caused the accident. A. Two cars collided.

Q. What caused the two cars to collide. A. Because they were on single tracks.

Q. Is there any other reason, Mr. Hunter. A. Because they passed the meeting point.

Q. Who did. A. I did." (R. pps. 147, 148, 149, 150. Also 194 SW 2d Pages 281, 282, 283.)

RESPONDENT'S COUNTER PROPOSITIONS IN ANSWER TO PETITIONER'S SPECIFICATION OF ERRORS

FIRST COUNTER PROPOSITION

The Court did not err in refusing to submit to the jury issues of negligence on the part of the Respondent in failing to provide an automatic block signal device in the sector of the collision. (In answer to Petitioner's First Specification of Error, briefed under point number 1.)

SECOND COUNTER PROPOSITION

The Court did not err in refusing to submit to the jury issues of negligence on the part of Respondent in employing the system it did for the passage of traffic in the sector of the collision. (In answer to Petitioner's Second Specification of Error, briefed under point number 2.)

THIRD COUNTER PROPOSITION

The Court did not err in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision. (In answer to Petitioner's Specification of Error number 3, briefed under Petitioner's point number 3.)

FOURTH COUNTER PROPOSITION

The Court did not err in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision. (In answer to Petitioner's Fourth Specification of Error, briefed under Petitioner's point number 4.)

THE FIRST BASIC QUESTION

Can the Petitioner recover any damages for personal injuries sustained by him as a result of a collision beteween two of Respondent's interurban cars, which collision was caused solely by Petitioner's negligent violation of the Respondent's rules and positive time card order?

THE SECOND BASIC QUESTION

Can the Petitioner recover under the Federal Employers Liability Act for injuries received by him as the result of

BLEED THROUGH– POOR COPY

a head-on collision between two of Respondent's interurban cars, when the jury found and the undisputed evidence conclusively shows that his negligence was the sole proximate cause of Petitioner's injuries?

COUNTER PROPOSITION PRESENTED AND SUMMARY OF THE ARGUMENT

1. There was no error on the part of the Trial Court in refusing to submit to the jury issues of negligence on the part of Respondent in failing to provide an automatic block signal device in the sector of the collision.

(a) There were, in fact, rules of the Company and time card regulations providing for the safe operation of trains in the sector of the collision which, if obeyed by the Petitioner, would have prevented the collision.

(b) There is no statutory duty upon the Respondent requiring the installation of block signals and, in truth and in fact, an Interurban line such as the Respondent is exempt from the installation of such block signals and there is no imputation of negligence from its failure to provide block signals in the sector of the collision.

(c) No imputation of negligence arises even to a steam railway for the failure to intall block signaling devices.

2. There was no error on behalf of the Trial Court in refusing to submit to the jury issues of negligence

on the part of the Respondent in employing the system it did for the passage of traffic in the sector of the collision.

(a) The evidence conclusively evidences the fact that the collision resulting in the inuries to the Petitioner resulted solely from his disobedience of Respondent's reasonable rules and time card instructions.

(b) There was no showing that the time card system which was employed by the Respondent was inadequate.

(c) The interpretation of regulations, rules and instructions promulgated by a railroad for the safety of its employees are not matters for the jury to pass upon, but are matters upon which the Court alone may pass.

(d) The carrier is under no absolute duty to furnish its employees a safe place to perform the duties incident to their employment. It is only under the duty to use ordinary care in providing the employee a safe place to perform the duties incident to his employment.

(e) The carrier having used reasonable care in the promulgation of its rules and time card instructions for the safety of the Petitioner, if obeyed by him, would have provided him a safe place to carry on the duties incident to his employment.

(f) If such rules had been obeyed by the Petitioner this accident would not have happened.

BLEED THROUGH– POOR COPY

(g) There was no duty on the railroad company to furnish other, better and later devices or systems, but only to use reasonable care in the providing of such system or devices if such system or devices are reasonable and adequate.

3. There was no error on the part of the Trial Court in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to slow down or properly apply his air brakes as he approached the point of collision.

(a) The evidence conclusively evidences the fact that the motorman of the southbound Interurban, Maxwell, did everything in his power to prevent the accident, and he did slow down his car and apply his air brakes prior to the collision.

(b) No negligence is shown on the part of the motorman of the southbond Interurban.

4. The Petitioner is not entitled to recover in this case because the collision causing his injuries was caused solely by the Petitioner's negligence, and violation of Respondent's rules and time card order.

(a) Hunter's actions in violating the time card instructions and rules was the sole cause of the accident.

(b) Hunter being solely in charge of the car, and no other person having anything to do with the operation of the car, he and he alone was responsible for the accident.

(c) Hunter is not entitled to recover in this case as a matter of law.

5. The jury having found that Petitioner's negligence was the sole proximate cause of the collision resulting in his injury, he is not entitled to recover.

(a) The right of recovery upon the Federal Employer's Liability Act is predicated upon negligence and not upon injury.

(b) The jury having found, and Petitioner's own testimony disclosing that his negligence was the sole proximate cause of the injury, he is not entitled to recover under the terms of the Act.

FIRST COUNTER PROPOSITION (Restated)

The Court did not err in refusing to submit to the jury issues of negligence on the part of the Respondent in failing to provide an automatic block signal device in the sector of the collision. (In answer to Petitioner's First Specification of Error, briefed under point number 1.)

STATEMENT

The witness, R. P. Hunter, testified that prior to a period of time between 1926 and 1930 there had at one time been a block signal between Woodlake and Denison, but the signal had been taken out, and, for more than twelve years prior to the collision, he had been running a car between

BLEED THROUGH– POOR COPY

Denison and Sherman, passing through Woodlake, and no block signal had been in existence during any of said time, and he had not been using or depending upon a block signal for more than twelve years before the accident (R. 67).

The plaintiff's witness, E. S. Burdette, testified that he had been familiar with the line between Denison and Sherman since 1932 and no block signal had been used by the Respondent, and no block signal had been in existence during that period of time (R. 92). The Petitioner testified he had been furnished a time card by the Respondent showing a positive meet with Train No. 15 at Woodlake and that such time card became effective on October 3, 1943, approximately six months before the accident (R. 57 and Defendant's Exhibit No. 1).

The Petitioner himself testified that, if he had stopped at Woodlake, as the time card and rules required him to do, this collision would not have occurred (R. 63-64).

ARGUMENT AND AUTHORITIES

The evidence in this case conclusively establishes the fact that the time card method of operation of its train movements by the Respondent had been satisfactory for at least twelve years prior to the happening of the collision in question. The Petitioner himself had been operating over this same line for twelve years or more under the time card method of operation. If the Petitioner had

only paid attention to the time card, this collision would not have occurred.

Courts will not legislate the method of operation of railroads and the appliances to be installed in connection therewith. This is the duty of Congress. Congress has seen fit to legislate on this very question, on the installation of blocking signals. The Federal law now provides that, after investigation, the Interstate Commerce Commission may require the installation of block signaling devices (see 49 U. S. A. Title 49, Sec. 26), but even this law applying to block signaling devices does not apply to interurban lines. Subdivision (a) of said Section 26 provides, in part, as follows:

> "Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway unless such railway is operated as part of a general steam-railroad system of transportation, but shall not exclude any part of a general steam-railroad system of transportation now or hereafter operated by any other motive power."

There was, therefore, no duty on the part of the Respondent in this case to install automatic block signaling devices by the positive mandate of the law.

The Federal Courts are definitely committed to the rule that there is no implication of negligence in the failure of even a steam railroad to install an automatic block signaling system on its railway.

BLEED THROUGH– POOR COPY

The very proposition of negligence for failure to install an automatic block signaling system was squarely before the Court in the case of *Keith vs. Wheeling & L. E. Ry. Co.*, 160 Fed. 2nd 645. In that case, one of the Plaintiff's specifications of negligence was the failure to install a block signaling system and in disposing of this contention, the Circuit Court said:

> "Finally, we think that the District Court was correct in deciding that there was no implication of negligence in the failure of Wheeling to install an automatic block system prior to the accident. Title 49 U. S. C. A., Section 26(b)."

It is, therefore, submitted that there can be no implication of negligence in this case on the part of the Respondent for its failure to install and maintain a block signaling device in the sector of the collision. It is, therefore, submitted that, under the evidence and the record in this case, the Court did not err in refusing to submit to the jury questions of negligence on the part of the Respondent in its failure to install automatic block signaling devices in the sector of the collision.

SECOND COUNTER PROPOSITION (Restated)

The Court did not err in refusing to submit to the jury issues of negligence on the part of Respondent in employing the system it did for the passage of traffic in the sector of the collision. (In answer to Petitioner's Second Specification of Error, briefed under point number 2.)

STATEMENT

The Petitioner testified, without contradiction, that he had been furnished a time card by the Company; that the rules of the Company required that he have this time card with him at all times; that, on the occasion in question, he did have such time card; and that the same was hanging on a hook right in front of him where he could see it at all times (R. 57). The time card showed he was to meet Train No. 15 at Woodlake (R. 61). He was supposed to stay at Woodlake until No. 15 showed up, or call the dispatcher (R.61). He did not wait for No. 15 or call the dispatcher (R. 61). He did not wait at Woodlake, as the time card required him to do (R. 61). He passed the meeting point and met No. 15 down on the curve (R. 61-52). It was his duty, under the rules of the Company, not only to meet No. 15 at Woodlake, but to ascertain if the No. 15 was displayed on the train order box and whether or not that train was carrying signals. This was a positive rule of the Company that had been in effect and had been obeyed by the Petitioner for more than thirty years (R. 59).

To quote his own words:

"Q. In other words, you disregarded the rules and didn't ascertain whether or not he was carrying signals?

A. It is like I said.

BLEED THROUGH– POOR COPY

Q. You didn't ascertain that that man had classification signal or car classification?

A. No." (R.59)

The time card under which Petitioner was working at the time is marked Defendant's Exhibit 1 and became effective October 3, 1943, about six months before the accident (Defendant's Exhibit 1, R. 146a). A time card meet is a meeting point set out in the time card and is a positive meet (R. 56). The only time the Petitioner had failed to stop at Woodlake, as he was required to do by the time card, during the six months period in which the time card had been in effect was the date the accident happened. If he had failed to have called the dispatcher, or waited at Woodlake, this accident would have happened before (R. 63). To quote his own words:

"Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake, as the time card and rules required you to do, this would not have happened?

A. No." (R. 63-64)

ARGUMENT AND AUTHORITIES

Since the Petitioner has not favored us, or the Court, with a statement under this point number 2, we are more or less at a loss to definitely ascertain what his complaint might be. However, as we understand the Petitioner's point of error number 2, he is complaining of the refusal of the trial Court to let the jury pass upon the adequacy

of the time card system of operation and the rules of the Company concerning the manner of operation of their cars.

We feel called upon at this time to challenge certain statements made by the Petitioner in his argument, as follows:

1. He states that there should have been more than one man on the car because of increase in traffic—no issue was requested in the trial Court inquiring whether or not the Respondent failed to provide a sufficient number of men to do the work required, and whether such negligence was a proximate cause. He certainly cannot now complain of any failure on the part of the trial Court to submit such issue. The record shows conclusively, however, that the practice of using one man cars had been in effect since 1932 and was nothing new (R. 55).

2. For the first time, it is intimated in Petitioner's argument under this point that there might have been a car in the Woodlake siding. This is just not true, as the record will reflect. The Petitioner himself positively testified that he thought he saw number 15 in the passing track (R. 62). If there had been an extra in the passing track, he would have gone on down and hit number 15 any way (R. 62).

To quote his own words concerning what he saw or did not see at Woodlake, the record reflects the following:

BLEED THROUGH– POOR COPY

"Q. When you got there, would you see whether or not he was there?

A. I rode up and stopped.

Q. Was there anything to confuse you in that—
Gullett: We object to the leading.

Woodrow: Was there anything there when you looked to see whether this car was there?

A. Yes, Sir.

Q. That you could have seen?

A. There was a telephone booth.

Q. What color was it?

A. Yellow.

Q. About the same color as these cars?

Gullett: We object to the leading and suggesting.

Woodrow: Was there any similarity of the color of that and the construction of what the company had there?

A. It was similar." (R. 73-74)

The only case cited by the Petitioner under this point is the case of *Lavender vs. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 Sup. Ct. 740. This case is easily distinguishable from the case at bar, in that, in the Lavender case, an employee was killed either by being hit by a mail hook or by an outsider for the purpose of robbery. The Court in that case merely held that the jury could draw such inferences as was logical to it from the testimony as it saw

fit, regardless of any other conclusion or conclusions to the contrary.

In this case, we have a man who, for some reason wholly unexplained by him, violated every known rule, regulation and time card instruction of the Respondent and, by such violation, caused a head-on collision. We fail to see the similarity in these two cases.

In this case the rules of the Company and the time card method of operation were reasonable and easily understandable. In fact, the Petitioner himself had worked under them for more than thirty years. In truth and in fact the Court of Civil Appeals of Texas correctly summed up this proposition, as follows:

> "There was no proof whatever that the time card system was inadequate, * * *" (R. 152)

The interpretation of regulations, rules and instructions promulgated by a railroad company are not matters to be passed upon by juries. If this was true, the method of operation of railroads would be left wholly to the whims and caprices of juries. The Federal Courts are definitely committed to the proposition that the interpretation of rules of railroad companies, where the same are reasonable and understandable, are not matters for the consideration of juries. In the case of *Great Northern Ry. Co. vs. Hooker*, 170 Federal 154, this very proposition is laid down by Judge Van Devanter, at page 159, as follows:

BLEED THROUGH- POOR COPY

"The trial court treated the interpretation of the rules prescribing the plaintiff's duty in the premises as a question of fact to be determined by the jury. But we are of opinion that it was a question of law to be determined by the court. Not only were the rules in the nature of a written instrument, but they contained no terms the meaning of which was not made plain by them; and, this being so, effect should have been given to the general rule that the interpretation of a written instrument rests with court, and not with the jury. Bellv. Bruen, 1 How. 169, 183, 11 L. Ed. 89; Goddard v. Foster, 17 Wall. 123, 143, 21 L. Ed. 589; Higgins vs. McCrea, 116 U. S. 671, 682, 6. Sup. Ct. 557, 29 L. Ed. 764; Scanlon vs. Hodges, 52 Fed. 354, 3 C. C. A. 113; Bowes vs. Shand, L. R. 2 App. Cas. 455 1 Labatt, Master and Severtant, Sec. 215. Moreover, it is held by this court that the reasonableness of such rules is to be determined by the court as a question of law, and not by the jury as a question of fact. Kansas, etc., Co. vs. Dye, 70 Fed. 24, 16 C. C. A. 604; Little Rock, etc., Co. vs. Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349. See, also, Scott vs. Eastern Ry. Co., 90 Minn. 135, 140 95 N. W. 892; Bailey's Personal Injuries, Sec. 3325. And it would seem that by analogy a like holding should be made when the question is one of interpretation."

To the same effect see *Chicago R. I. & P. Co. vs. Ship*, 174 Fed. 353. There is no duty upon a railroad company to furnish an employee an *absolutely* safe place to perform the duties incident to his employment. There exists merely the duty to use reasonable care.

The case of *Yazoo & M. V. R. Co. vs. Mullins*, 115 Miss. 343, 76 So. 147, 249 U. S. 531, 63 L. Ed. 754, was a case wherein a flagman was killed apparently trying to catch a train moving out of a station too fast and one of the instructions given by the trial Court was to the effect that an *absolute* duty rested upon the railroad to furnish the deceased with a safe place to perform the duties incident to his employment. Judgment was for the plaintiff in the trial Court, and the same was affirmed by the Supreme Court of Mississippi, but, upon writ of error, the Supreme Court of the United States, speaking through Judge Brandeis, reversed the decision of the Supreme Court of Mississippi and stated as follows, using the following language:

> "But the trial court also instructed the jury that 'it was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment.' It is clear that, under the circumstances of this case, the duty was not an absolute one; there was merely a duty to use reasonable care. Chicago & N. W. R. Co. v. Bower, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. Rep. 624; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. C. A. 834; Choctaw, O. & G. R. Co. v. Tennessee, 191 U. S. 326, 331, 48 L. Ed. 201, 206, 24 Sup Ct. Rep. 99, 10 Am. Neg. Rep. 240."

Now, in this case, the Respondent did use reasonable care in the promulgation of its rules and time card in-

BLEED THROUGH– POOR COPY

structions for the safety of the Petitioner, which if obeyed, provided him a safe place to carry on the duties incident to his employment. If these rules and time card instructions had been obeyed by the Petitioner, the place furnished to carry on his duties incident to his employment would have been a safe one.

Even if there had been in existence some where else on other railroads, or in other locations, other and better methods or appliances or systems, than the rules and time card method of operation used by the Respondent, even in that event, the Respondent could not have been guilty of negligence in employing the method it did, in the absence of a showing as aforesaid that the same were inadequate or unreasonable. This record is as silent as a tomb of any showing that the method employed by the Respondent was not both safe, suitable and reasonable; the fault in this case layed wholly with the Petitioner himself.

As said by this Court in the *Chicago & N. W. R. Co. vs. Bower*, 241, U. S. 470, 60 L. Ed. 1107, at page 1109:

> "The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed 235, 241, 10 Sup Ct.

Rep. 1044; Patton v. Texas & P. R. Co. 179 U. S. 658, 664, 45 L. Ed. 361, 364, 21 Sup. Ct. Rep. 275."

The above was a boiler inspection case and the rule was applied even under the rigid requirements of that Act. The rule above announced was reiterated and followed by this Court in the case of *Baltimore & O. R. Co. vs. Greger*, 166 U. S. 522, 69 L. Ed. 421.

It is, therefore, respectfully submitted that the Respondent could not have been guilty of negligence in employing the system it did for the passage of traffic in the sector of the collision, and the Trial Court did not err in refusing to submit issues concerning the Respondent's negligence in this connection.

THIRD COUNTER PROPOSITION (Restated)

The Court did not err in refusing to submit to the jury issues of negligence on the part of the southbound motorman, in failing to properly slow down his car before reaching the point of collision. (In answer to Petitioner's Specification of Error number 3, briefed under Petitioner's point number 3.)

FOURTH COUNTER PROPOSITION (Restated)

The Court did not err in refusing to submit to the jury issues of negligence on the part of the southbound motorman in failing to apply his air brakes as he approached the point of collision. (In answer to Petitioner's Fourth

BLEED THROUGH– POOR COPY

Specification of Error, briefed under Petitioner's point number 4.)

STATEMENT

Since the Petitioner has briefed his points 3 and 4 together, and since the same are similar in nature, Respondent's Counter Propositions 3 and 4 will be briefed together.

The Petitioner has again failed, under these two points, to give us the benefit of any statement, except a small quotation from the record as shown on page 25 of his brief, as follows:

> "I was driving as fast as the car would go (R. 128). I wouldn't swear how fast they would go because they had no speedometers. But I had it wide open. I was on a straight-away track when I saw him and I had it wide open. When I saw Mr. Hunter's car I was on a straight-away track just prior to the time I reached the curve. I had it wide open— the car was going just as fast as I could make it go." (R. 129)

It is true that Maxwell, the motorman on the southbound car, did testify as above, but the Petitioner does not quote the testimony of the witness Maxwell to show what he actually did when he discovered the northbound car coming toward him.

The Court will bear in mind that, under the Petitioner's own testimony, Maxwell was where he was supposed to

be, doing that which he was supposed to be doing at the time he became involved in this accident. We quote Maxwell's testimony concerning what he did at the very time of the collision, as follows:

"Q. When you saw Mr. Hunter's car moving towards you, what did you do?

A. Put the air on, opened the door and jumped.

Q. Was there any other way you could have stopped that car of yours or check its speed?

A. No, that is the way we stop them, with air.

Q. With air brakes?

A. Yes sir.

Q. Did you 'big gun' it like the boys say?

A. Yes sir, I 'big holed' it.

Q. You just threw that thing on all you could and you opened the door and jumped?

A. Yes sir.

Q. All of us may not know what you mean, Mr. Maxwell, when you say you 'big holed' it. What do you mean when you say you 'big holed' it?

A. Put the air on in the emergency.

Q. In other words, you put on all the air you had, all the braking power you had?

A. Yes sir.

Q. And that was the emergency?

A. Yes sir, that is right.

BLEED THROUGH– POOR COPY

Q. And I believe among railroaders and interurban operators when you say you big hole it that means you put it all on?

A. Yes sir.

Q. Is that all the braking power you had?

A. Yes sir.

Q. Was that all the braking power on that car on that occasion?

A. Yes.

Q. Did you big hole it immediately upon seeing that you were approaching his car and he was approaching you?

A. That is right.

Q. I mean, Mr. Hunter?

A. Yes.

Q. Immediately you applied the brakes?

A. Yes sir.

Q. When I say you applied the brakes I mean what you say when you say that you big holed it?

A. Yes sir.

Q. Mr. Maxwell, what effect does applying the brakes, the emergency, on the car, have on the power, the electric power?

A. On the power?

Q. Yes sir?

A. Well the brakes on the car don't have any effect on the power, on the trolley.

Q. Well at the time you applied the emergency on your car or big holed it, did you do anything with reference to cutting the power?

A. Yes sir, cut off the power.

Q. You cut off the power?

A. Yes, sir. Did you say cut off or turn off?

Q. Did you cut it off or turn it off?

A. Turn it off with the controller.

Q. And you did that on that occasion?

A. Yes sir.

Q. At approximately the same time that you applied the emergency?

A. Yes sir, I applied the emergency air brakes." (R. 129-131)

ARGUMENT AND AUTHORITIES

At the outset may we invite the Court's attention to its own definition of negligence in *Tiller vs. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 66 S. Ct. 444:

> "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done."

BLEED THROUGH– POOR COPY

We submit that the above quoted verbatim statement of Maxwell shows that he did everything in his own power to avoid this collision that it was humanly possible for him to do—he cut off the power—reversed the car—and set the air in emergency. It is submitted that he, Maxwell, exercised due care under the circumstances. He did that which a reasonably prudent man would have done under similar circumstances of the situation. He did nothing that a reasonable person, under the circumstances, would not have done. He certainly used all of the means at hand to properly slow down his car before reaching the point of collision and certainly applied his air brakes as he approached the point of the collision. He was not guilty of any negligence, and there was no submissible issue of negligence under Petitioner's point 3 and 4. A plaintiff cannot just allege negligence under the Federal Employers Liability Act and not prove it. It is, therefore, submitted that the trial Court did not err in refusing to submit issues of negligence under Petitioner's points 3 and 4.

It having been demonstrated that the Petitioner was not, under the record and the law in this case, entitled to the submission of any of the complained issues of negligence, it is, therefore, the position of the Respondent there is nothing further for the Court to review, since the liability of the Respondent is predicated upon negligence. See *Tiller vs. Atlantic Coast Line R. Co.*, supra. The Respon-

dent is not an insurer of the safety of its employees. See *Tiller vs. Atlantic Coast R. Line Co.*, supra.

However, in view of the statements made by the Petitioner in his behalf, the Respondent submits the following two basic questions for the consideration of the Court.

THE FIRST BASIC QUESTION RESTATED

Can the Petitioner recover any damages for personal injuries sustained by him as a result of a collision between two of Respondent's interurban cars, which collision was caused solely by Petitioner's negligent violation of the Respondent's rules and positive time card order?

STATEMENT

The facts in this case are correctly, fairly, and impartially stated in the opinion of the Court of Civil Appeals, and for the sake of brevity the Respondent will not attempt to reiterate this entire transaction. The Petitioner's own testimony discloses that had he waited at Woodlake as the time card and the rules of the Company required him to do, this accident would not have happened. On the occasion in question, he was proceeding on Train No. 58 in a northerly direction and Train No. 15 operated by Motorman Maxwell was proceeding in a southerly direction. To quote his own words:

> "Q. Now, No. 15 was coming along in a southerly direction. That is where he is supposed to be.

A. Yes.

Q. At that time, you were supposed to be waiting back at Woodlake?

A. Yes, sir.

Q. And you didn't wait for him at Woodlake as the time card required you to?

A. I didn't, no.

Q. And you passed the meeting point and met him down at the curve.

A. Yes, sir." (R. 61 and 62)

He further testified:

"Q. During all that time, you had been following this regular schedule that you outlined to the jury, leaving Sherman at those various times?

A. Yes, sir.

Q. This is the only time in the six months period that you failed to stop and wait for No. 15 at Woodlake, or call the dispatcher?

A. That's right.

Q. If you had failed to call the dispatcher or wait at Woodlake prior to May the 2nd, you would have had the accident prior to this time?

A. Yes, sir, the chances are.

Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake as the time card and rules required you to do, this would not have happened?

A. No." (R. 63)

He further testified:

"Q. What caused the accident?

A. Two cars collided.

Q. What caused the two cars to collide?

A. Because they were on a single track.

Q. Is there an other reason, Mr. Hunter?

A. Because they passed the meeting point.

Q. Who did?

A. I did." (R. 66)

ARGUMENT AND AUTHORITIES

The Petitioner, R. P. Hunter, at the time of the collision in question was operating an interurban car. He was solely in charge of the car. No other person was responsible for living up to and obeying the rules, regulations and time card instructions of the Company. The responsibility for this unfortunate accident rests solely upon the shoulders of R. P. Hunter. He violated every known instruction and duty that he owed not only to himself and to the Respondent but to the passengers on his car. He just did not do that which he was commanded, required and was his duty to do.

It is fundamental, and a citation of authorities is not necessary on the basic difference between assumed risk and negligence or contributory negligence.

The basic difference being "assumed risk is predicated upon contract. Negligence or contributory negligence is predicated upon conduct."

It is exceedingly difficult under some circumstance to distinguish between these two concepts, for the reason that the same have been used interchangeably by the courts, and one has been woven more or less into the other. The recent trend of the Federal Employers' Liability Act cases, beginning with the case of *Tiller vs. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, that certain factors of the doctrine of assumption of risk were eliminated by the 1939 Amendment. All of the cases cited by the Petitioner in his brief seemed to bear out this contention. However, where the employee himself was solely responsible for an accident, we think that the correct construction of the so-called 1939 Amendment is given by the federal courts in the case of *Willis vs. Pennsylvania Railroad Company*, 122 Fed. (2d) 248 (Writ of Certiorari denied), 314 U. S. 684, 86 L. Ed. 547, as follows:

> "If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his death. In such circumstances his executrix can have no recovery under the Act. Great Northern Ry. v. Wiles, 240 U.S. 444, 36 S. Ct. 406, 60 L. Ed. 732; Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; Unadilla Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; Blunt v. Pennsylvania R. Co., 6 Cir., 9 F. 2d 395; Unadilla Valley Ry. Co. v. Dibble, 2 Cir., 31

> F. 2d 239. The recent amendment, 45 U. S. C. A. Sec. 54, excluding as a defence assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

We further think that the correct rule, in so far as this case is concerned, was laid down by Justice Frankfurter in the *Tiller vs. Atlantic Coast Line R. Co.*, supra. as follows:

> "By specific provisions in the Federal Employers' Liability Act, it has swept away 'assumption of risk' as a defense once negligence is established. But it has left undisturbed the other meaning of 'assumption of risk,' namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent."

Quoting further from the concurring opinion by Justice Frankfurter in the *Tiller vs. Atlantic Coast Line R. Co.*, supra:

> "To be sure, this decision (referring to Chesapeake & O. R. Co. v. Nixon, 271 U. S. 218, 70 L. Ed. 914, 46 S. Ct. 495) was made prior to the 1939 amendment, but in this respect that enactment makes no change in the law. The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee 'assumed the risk' of its negligence. But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—

> risks which cannot be eliminated through the carrier's exercise of reasonable care."

We do not think it was the intention of Congress by the enactment of this provision to overthrow those cases in which an employee himself was solely at fault as was Hunter in this case. In every case cited by the Petitioner and in every case we have been able to find, construing the so-called 1939 amendment to the Federal Employers' Liability Act, there has been more than one actor in the drama whose negligence could have contributed to the accident; but in this case, we have only one actor, R. P. Hunter himself. This actor, R. P. Hunter, disregarded a specific rule and standing time card instruction promulgated for his own safety. We think the correct rule nas been recently laid down by the court in the *Chigago, St. P., M and O. R. Co. vs. Arnold*, 160 Fed. (2d) 1002. In this case, the plaintiff Arnold was injured as a result of an accident involving cars without sufficient clearance. The testimony was conflicting as to the actual occurrence and what had transpired immediately prior to the occurrence. A fellow employee testified in the case that he gave Arnold a specific warning and instruction not to do what which he did. One of the rules of the company required that cars should not be placed upon side tracks or adjoining tracks without proper clearance, and the Circuit Court laid down the following ruling:

> "Liability arises from negligence not from injury under this Act (Federal Employers' Liability Act).

And that negligence must be the cause of the injury. Brady v. Southern R. Co., 320 U. S. 476, 484, 64 S. Ct. 233, 236, 88 L. Ed. 239. In the following cases arising under the Federal Employers' Liability Act it is held that a servant's disregard of a specific order or of a standing rule promulgated for his safety bars recovery, though the injury of the employee was due as well to the negligence of other employees of the railway company. Pere Marquette R. Co. v. Haskins, 6 Cir., 62 F. (2d) 806, 8067; Southern R. Co. v. Hylton, 6 Cir., 37 F. 2d 843, 845; Hylton v. Southern R. Co. 6 Cir., 87 F. 2d 303,395; Louisville & N. R. Co. v. Davis, 6 Cir., 75 F. 2d 849, 851, certiorari denied 296 U. S. 603, 56 S. Ct. 119, 80 L. Ed. 4227; Paster v. Pennsylvania R. R. Co., 2 Cir. 43 F. 2d. 908, 910; Atchison, T. & S. F. R. Co. v. Ballard, 5 Cir., 108 F. 2d 768, 771; Van Derveer v. Delaware, L & W R. Co., 2 Cir., 84 F. 2d 979, 981; and see Rocco v. Lehigh Valley R. Co., 288 U. S. 275, 279, 53 S. Ct. 343, 77 L. Ed. 743; Great Northern R. Co. v. Wiles, 240 U. S. 444, 448, 36 S. Ct. 406, 60 L. Ed. 732. In Van Derveer v. Delaware, L. & W. R. Co., supra, page 981 of 84 F. 2d, the opinions of the Supreme Court frequently cited as sustaining the rule stated are analyzed, and the conclusion is reached that of the injured employee has contributed to his injury by the violation of a rule or express instruction he cannot recover."

We are still of the opinion that there is no change in the law in so far as the facts in this particular case are concerned, and that rules laid down by this court in the following cases hold that the violation or disobedience of

a rule without any excuse was the sole procuring cause or the sole proximate cause of the injury or death of such employee:

Brady vs. Southern Railway Company, 88 L. Ed. 239, 320 U. S. 476, 64 Sup. Ct. 232;

Davis vs. Kennedy, 69 L. Ed. 212, 266 U. S. 147, 45 Sup. Ct. 33;

Southern Railway Company vs. Dantzler, 76 L. Ed. 1127, 286 U. S. 318, 52 S. Ct. 520;

Southern Railway Company vs. Youngblood, 76 L. Ed. 1124, 286 U. S. 313, 52 S. Ct. 518;

Unavilla Valley Railway Company vs. Caldine, 73 L. Ed. 224, 278 U. S. 139, 49 Sup. Ct. 91.

In the Caldine case, supra, the employee of the railroad violated his positive written orders, just as the petitioner, Hunter did in this case. Instead of waiting for a train he was supposed to wait for, he disobeyed the order, the purpose of which was to prevent a collision. He without any excuse for disobeying it pulled out on the main line and was killed. (In this case, Hunter disobeyed his order in failing to wait for Train No. 15 at Woodlake) And in passing upon this very point, this court in an opinion by Mr. Justice Holmes made the following statement:

"It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad

company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

The Petitioner in his brief seems to seize upon the case of *Keith vs. Wheeling & L. E. Ry. Co., et al*, 160 Fed. (2d) 654. There is no resemblance whatever in this case and the Keith case, for the reason that in the Keith case there was an equal responsibility between the pilot and the engineer and the fact that the order was overlooked placed joint responsibility upon them. Certainly, if the engineer and pilot were both negligent, then it would have been the duty of the jury to have apportioned the negligence between them under the terms and conditions of the Federal Employers' Liability Act. But in this case there was no equal responsibility. The responsibility was Hunter's and Hunter's alone.

It is respectfully submitted that the carrier cannot be held responsible in cases of this kind for injuries arising from the employee's own fault and which cannot be eliminated though the railroad exercises reasonable care.

It is respectfully submitted that in this case the railroad exercised every reasonable care for the protection of R. P. Hunter, and he of his own volition brought about a condition which made his position precarious with the resulting injuries to himself.

It is therefore respectfully submitted that Basic Question No. One should be answered in the negative.

THE SECOND BASIC QUESTION RESTATED

Can the Petitioner recover under the Federal Employers' Liability Act for injuries received by him as the result of a head-on collision between two of the Respondent's interurban cars, when the jury found and the undisputed evidence conclusively shows that his negligence was the sole proximate cause of Petitioner's injuries?

STATEMENT

The trial court submitted this case to the jury under proper instructions and under proper interrogatories embracing the doctrine of imminent or discovered peril. (R. 23, 24, 25, and 26)

The jury found against the Petitioner on the so-called doctrine of discovered peril. (R. 28)

The court then submitted to the jury the following interrogatory:

"Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the southbound interurban car upon the occasion in question was the sole proximate cause of the injuries, if any, he received?

ANSWER: Yes or no." (R. 27)

The jury answered the foregoing interrogatory "Yes." (R. 30)

The jury therefore found that R. P. Hunter's negligence was the sole proximate cause of his injuries.

The Respondent adopts its statement under its First Basic Question as an additional statement under this basic question.

ARGUMENT AND AUTHORITIES

The Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, 10 F. C. A. Title 45, Sec. 51, provides that every carrier by railroad shall be liable in damages to the person suffering such damages, etc., resulting in whole or in part from the negligence of the carrier, of the officers, agents or employees of such carrier. It was therefore necessary that R. P. Hunter show to the jury that his injuries were caused in whole or in part by the negligence of the railway company or some of its officers or employees.

It was further necessary that R. P. Hunter show to the satisfaction of the jury that such negligence was a proximate cause of his injuries. See *Lang vs. New York Central R. Co.*, 255 U.S. 455, 65 L. Ed. 729, 41 S. Ct. 381.

In *Tiller vs. Atlantic Coast Line*, 218 U. S. 54, 87 L. Ed. 610, it is stated:

> "In order to recover under the Federal Employers' Liability Act, it was encumbent upon the Petitioner to prove that the Respondent was negligent and that such negligent was the proximate cause in whole or in part of the fatal accident."

It is elementary, of course, that if Hunter's negligence was the sole proximate cause of his injuries, no negligence on the part of the railway company could have been a proximate cause; and since the jury did find that Hunter's negligence was the sole proximate cause of his injuries, since he was wholly at fault, he cannot recover under the Federal Employers' Liability Act.

On the proposition of the employee's negligence being the sole proximate cause of the citation of authorities is unnecessary, it being fundamental. However, the Court's attention is respectfully invited to the case of *Jessionowski vs. Boston & Maine Railroad Company*, 91 L. Ed. 355 (Advance Sheet5), decided January 13, 1947, wherein this court put its stamp of approval on an instruction given by the trial court reading as follows:

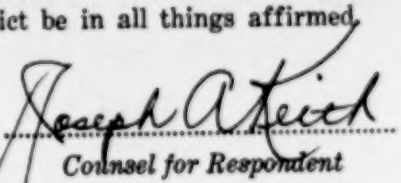
> "Of course, if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover."

Since the jury found that Hunter's negligence was the sole proximate cause of his injuries, he cannot recover in this case for the reason that to allow him a recovery would make the Respondent an insurer of safety of its employees, and it has never been the intention of the law to make the Respondent such. The rule is very tersely stated in the case of *Whelock vs. Freiwald* (C. C. A. 8th) 66 Fed. (2d) 694, as follows:

> "(1) The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover the defendants must have been guilty of some act of negligence which was the proximate cause of Freiwald's death. Baltimore & O. R. Co. v. Berry, 286 U. S. 272, 52 S. Ct. 510, 76 L. Ed. 1098; Atchison, T & S. C. R. Co. v. Toops, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896; Coyne v. Union Pac. R. Co., 133 U. S. 370, 10 S. Ct. 33 L. E. 651; Reese v. Philadelphia & B. R. Co., 239 U. S. 463, 36 S. Ct. 134, 60 L. Ed. 384."

Since the Federal Employers' Liability Act denies the plaintiff, R. P. Hunter, a recovery when his negligence was the sole proximate cause of his injuries, it is respectfully submitted that Basic Question No. Two should be answered in the negative.

WHEREFORE, the Respondent prays that the judgment of the Court of Civil Appeals for the Third Supreme Judicial District be in all things affirmed.



Counsel for Respondent

GULLETT & GULLETT
Security Building
Denison, Texas

FREEMAN, WOLFE & KEITH
M. & P. Bank Building
Sherman, Texas
Of Counsel

Contemporaneously with the mailing of this brief to the Clerk of the Supreme Court of the United States, a copy of this brief has been furnished to Mr. Spearman Webb and Mr. F. Neilson Rogers of Sherman, Texas, Counsel for the Petitioner.